LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
NOV 15 1966
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1966.

No. 773

MANDELL, SPECTOR, RUDOLPH CO.,
Petitioner,

v.

THE UNITED STATES,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

HAROLD E. KOHN,
WILLIAM T. COLEMAN, JR.,
DAVID H. MARION,
2600 Fidelity-Philadelphia Trust Bldg.,
Philadelphia, Pa. 19109
Attorneys for Petitioners.

Of Counsel:
DILWORTH, PAXSON,
KALISH, KOHN & LEVY,
2600 Fidelity-Phila. Trust Bldg.,
Philadelphia, Pa. 19109

NED STEIN,
1420 Walnut Street,
Philadelphia, Pa. 19102

International, 711 So. 50th St., Phila., Pa. 19143—Tel. SA 7-8711 Area Code 215

BLANK

PAGE

INDEX.

	Page
Opinions Below	1
Jurisdiction	2
Question Presented	2
Statute Involved	3
Statement of the Case	4
Reasons for Granting the Writ	6
The Third Circuit's Decision Eliminates From § 9(b) of the Administrative Procedure Act the Right to Achieve Compliance Guaranteed by Congressional Statute to Prevent Administrative Abuse of the Licensing Power	6
Conclusion	9
Appendix—Opinion of the United States Court of Appeals for the Third Circuit	11

TABLE OF CITATIONS.

Case: Page

Pan Atlantic SS. Corp. v. Atlantic C. L. RR., 353 U. S. 436, 440, 1 L. Ed. 2d 963, 77 S. Ct. 999 (1957) 8

Statutes and Authorities: Page

Administrative Procedure Act, 60 Stat. 242, § 9(b), 5 U. S. C. § 1008(b) 3, 4, 6, 7, 8

Attorney General's Manual on the Administrative Procedure Act, p. 90 (1947) 7

House Report No: 1980, 79th Cong., 2nd Sess., pp. 40-41, reprinted, Sen. Doc. 248, pp. 274-75 6

Lavery, Federal Administrative Law, § 125 (1952), p. 74 7

Note, "Procedural Safeguards for Licensees: Section 9(B) of the APA," 75 Harv. L. Rev. 383-84 (1961) 6, 8

Perishable Agricultural Commodities Act:

§ 2, 7 U. S. C. § 499b 4

§ 9, 7 U. S. C. § 499i 4

Remarks of Senator McCaren, reprinted, Sen. Doc. 248, p. 323 6

Remarks of Rep. Walter, 92 Congressional Record 5654, 79th Cong., 2nd Sess. (1946), reprinted, Sen. Doc. 248, 79th Cong., 2nd Sess., p. 368 6

Senate Document 248, 79th Cong., 2nd Sess., 1946, p. 35 7

Senate Report No. 752, 79th Cong., 1st Sess., reprinted, Sen. Doc. 248, p. 211 6

5 U. S. C. § 1040 2

28 U. S. C. § 1254(1) 2

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1966.

No.

MANDELL, SPECTOR, RUDOLPH CO.,
Petitioner,

v.

THE UNITED STATES,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Petitioner, Mandell, Spector, Rudolph Co., prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit which affirmed an order of the Judicial Officer of the Department of Agriculture.

OPINIONS BELOW.

The Opinion of the Court of Appeals for the Third Circuit is reported at 364 F. 2d 889 and is reprinted in the Appendix, *infra*, pp. 11-20. The opinions of the Judicial Officer of the Department of Agriculture are reported at 24 A. D. 651, 897, 1025, and are reprinted in the Joint Appendix filed in the Court of Appeals at pp. 594a-645a thereof, copies of which have been deposited herewith. The Hearing Examiner's Recommended Decision is also reprinted in the deposited Joint Appendix at pp. 479a-571a thereof.

JURISDICTION.

The judgment of the Court of Appeals for the Third Circuit sought to be reviewed was entered on September 23, 1966. A Petition for Rehearing was denied on September 23, 1966. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1) and 5 U. S. C. § 1040.

QUESTION PRESENTED.

Petitioner-licensee, having been accused of violating accounting and record-keeping provisions of the Perishable Agricultural Commodities Act, tendered repayment of the alleged underpayments and corrected its record-keeping system to conform with the Act and Regulations thereunder. There has been no further complaint against it for any reason since that time, 1962. The Department of Agriculture refused to accept petitioner-licensee's tendered repayment as constituting compliance and took the position that it was impossible for petitioner to achieve compliance, notwithstanding the right to achieve compliance provided to federal licensees by the Administrative Procedure Act. In disciplinary proceedings before the Judicial Officer for the Secretary of Agriculture, a 90-day license suspension was imposed which, it is admitted, will effectively destroy petitioner's business permanently. The Court of Appeals for the Third Circuit affirmed. Therefore, the question presented is:

Did not the administrative procedure affirmed by the court below eliminate from the Administrative Procedure Act and deny to petitioner the vital protection guaranteed by Congress to federal licensees accused of statutory violations—the right to achieve compliance with the law in advance of license suspension proceedings?

STATUTE INVOLVED.

§ 9(b) of the Administrative Procedure Act, 60 Stat. 242, 5 U. S. C. § 1008(b) is the statutory provision here in question (the language relevant to this case is italicized):

"In the exercise of any power or authority—

* * *

(b) In any case in which application is made for a license required by law the agency, with due regard to the rights or privileges of all the interested parties or adversely affected persons and with reasonable dispatch, shall set and complete any proceedings required to be conducted pursuant to sections 1006 and 1007 of this title or other proceedings required by law and shall make its decision. Except in cases of willfulness or those in which public health, interest, or safety requires otherwise, *no withdrawal, suspension, revocation, or annulment of any license shall be lawful unless, prior to the institution of agency proceedings therefor,* facts or conduct which may warrant such action shall have been called to the attention of the licensee by the agency in writing *and the licensee shall have been accorded opportunity to demonstrate or achieve compliance with all lawful requirements.* In any case in which the licensee has, in accordance with agency rules, made timely and sufficient application for a renewal or a new license, no license with reference to any activity of a continuing nature shall expire until such application shall have been finally determined by the agency."

STATEMENT OF THE CASE.

During 1961 and 1962 officers of the United States Department of Agriculture investigated the records of petitioner Mandell, Spector, Rudolph Company (MSR), a Philadelphia wholesaler of fresh fruits and vegetables. The investigators claimed that MSR had violated the Perishable Agricultural Commodities Act (PACA) by failing to maintain adequate records and by underpaying and failing properly to account to a few of its shippers and consignors.[1]

At the conclusion of the investigations, petitioner, without admitting liability, issued a check in the full amount of the alleged underpayment to one consignor and tendered repayment of the remaining alleged underpayments.[2] In addition, petitioner revised and reformed its record-keeping system to bring it into strict, technical compliance with the applicable Regulations under the PACA.

The officers of the Department of Agriculture took the position that petitioner could not demonstrate or achieve compliance with the PACA, since it could not undo its past violations. Accordingly, the Department refused to accept the tendered repayments as constituting compliance and ignored the fact that petitioner's record-keeping reforms had cured the deficiencies charged by the investigators.

The Department, in token recognition of the requirements of Section 9(b) of the Administrative Procedure Act, sent petitioner a formal notice of the alleged violations. It then instituted license revocation proceedings under §§ 2 and 9 of the PACA (7 U. S. C. §§ 499b, 499i), in which the

---

1. Underpayments and *overpayments* were claimed which aggregated a total underpayment of only $3,856 over a period of a year and a half, in a business with a volume of $5,000,000 per year.

2. No subsequent complaint has been received from any private party or Government officer concerning petitioner's accounts of sales or record-keeping. This remains true to the present time, during which petitioner's business has been in continuous operation.

Judicial Officer ordered petitioner's license suspended for 90 days.[3] The Court of Appeals for the Third Circuit affirmed. It is admitted that the license suspension for such an extended period will destroy petitioner's business grossing approximately $5,000,000 a year because of alleged estimated non-willful underpayments (and *overpayments*) totaling $3,856, payment of which petitioner has tendered, and destroy the jobs of its 30 employees.

3. The Department did not charge that the alleged violations had been willful, and no finding of willfulness was made by the Judicial Officer.

REASONS FOR GRANTING THE WRIT.

The Third Circuit's Decision Eliminates From § 9(b) of the Administrative Procedure Act the Right to Achieve Compliance Guaranteed by Congressional Statute to Prevent Administrative Abuse of the Licensing Power.

The federal question here at issue is one of vital importance, not merely to petitioner and the Department of Agriculture, but to the hundreds of thousands of holders of federal licenses throughout the country. Congress enacted § 9(b) of the Administrative Procedure Act in recognition that the power to suspend and revoke licenses is literally the power of commercial life and death. In order to restrict the use of this most powerful of weapons in the administrative agency's arsenal, Congress established both procedural and substantive safeguards to the licensee which were to come into play prior to any license suspension proceeding. See Note, "Procedural Safeguards for Licensees: Section 9(B) of the APA," 75 Harv. L. Rev. 383-84 (1961).

Section 9(b) first requires written notice of the alleged violations which may warrant suspension. In this respect Congress merely restated the pre-existing due process requirement of notice and opportunity to defend. But Congress went much further by requiring in addition[4] that

4. An examination of the Congressional Record and the committee reports leaves no doubt that the opportunity to achieve compliance was to be a protection to the licensee in addition to the notice requirement. Remarks of Rep. Walter, 92 Congressional Record 5654, 79th Cong., 2nd Sess. (1946), reprinted, Sen. Doc. 248, 79th Cong., 2nd Sess., p. 368. See also remarks of Senator McCaren, reprinted, Sen. Doc. 248, p. 323; House Report No. 1980, 79th Cong., 2nd Sess., pp. 40-41, reprinted, Sen. Doc. 248, pp. 274-75; Senate Report No. 752, 79th Cong., 1st Sess., reprinted, Sen. Doc. 248, p. 211.

"the licensee shall have been accorded opportunity to demonstrate or achieve compliance with all lawful requirements" prior to institution of suspension proceedings. The nature of this "opportunity" was explained by the Senate Judiciary Committee as *"an opportunity for the correction of conduct questioned by the agency"*. (Senate Document 248, 79th Cong., 2nd Sess., 1946, p. 35.) (Emphasis supplied.)

The Department of Agriculture in the present case adopted a position obviously at odds with the plain language of § 9(b) which guarantees petitioner the right to "achieve compliance" as a condition precedent to disciplinary action. The Department successfully contended below that the accountings already rendered could not be undone, and that the reformed record-keeping system could not amount to compliance in the past when proper records had not been kept.[5]

To say that a licensee does not "achieve compliance" unless he demonstrates *past* compliance—the equivalent of a successful denial of the offense charged—is clearly to eliminate the right of "compliance" from the Act and re-

---

5. The Government's position was summarized as follows at pp. 44-45 of its brief below:

> "The short of the matter is that, as to the false accountings which had been rendered, MSR *could not* of course, 'achieve compliance'; *i.e., it could not undo the erroneous accounts sales* which had been rendered. And, while it had every opportunity to 'demonstrate' compliance throughout the administrative proceedings, it utterly failed to do so. . . . And, whether or not petitioner may now be keeping accurate and proper records, that does not amount to 'compliance' in the past when proper records admittedly were not kept."

Thus, the Department of Justice rejected its own previous interpretation of § 9(b) as set forth in the Attorney General's Manual on the Administrative Procedure Act, p. 90 (1947), and quoted in Lavery, Federal Administrative Law, § 125 (1952), p. 74:

> "This sentence requires an Agency to *give a Licensee an opportunity to change his conduct* before his License can be revoked by any Agency, ..." (Emphasis supplied.)

duce the two-fold protection of § 9(b) merely to the single and pre-existing due process protection of notice and opportunity to defend. Yet the Judicial Officer and the Court of Appeals adopted the Department's construction of § 9(b) and found that the Administrative Procedure Act had been satisfied by the mere sending of a formal letter giving notice of the violations charged. The construction of the court below, unless reviewed and reversed by this Court, will drastically curtail the protections to federal licensees expressly provided by Congress. It will relieve administrative agencies of the burden of ever having to prove willfulness in license suspension or revocation proceedings. Administrative officers, under this decision, will be able to impose at will the capital punishment of commercial extinction for first offenses and unintentional misconduct violative of even the most minor of the myriad regulations under which federal licensees must operate.

It was this very danger which Congress sought to remedy by enacting § 9(b) and granting licensees the right to take corrective action before losing their licenses. This Court has said in construing another provision of § 9(b), "Where the remedy for an evil is clear, the remedial provisions of the Administrative Procedure Act should be given full effect." *Pan Atlantic SS. Corp. v. Atlantic C. L. RR.*, 353 U. S. 436, 440, 1 L. Ed. 2d 963, 77 S. Ct. 999 (1957). It is therefore imperative that this Court resolve the construction of § 9(b) to preserve to the licensee the right to "a second chance"[6] to reform his conduct which Congress intended and provided as a limitation on the Administrative power over licenses.

---

6. Note, *supra*, 75 Harv. L. Rev. 383, 384, 386.

CONCLUSION.

For the reasons stated above, this Court should grant the petition and issue a writ of certiorari to review the decision of the Court of Appeals for the Third Circuit.

Respectfully submitted,

HAROLD E. KOHN,
WILLIAM T. COLEMAN, JR.,
DAVID H. MARION,
2600 Fidelity-Philadelphia Trust Bldg.,
Philadelphia, Pennsylvania 19109
Attorneys for Petitioner.

Of Counsel:

DILWORTH, PAXSON, KALISH, KOHN & LEVY,
2600 Fidelity-Philadelphia Trust Bldg.,
Philadelphia, Pennsylvania 19109

NED STEIN,
1420 Walnut Street,
Philadelphia, Pennsylvania 19102

BLANK

PAGE

APPENDIX.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 15451

MANDELL, SPECTOR, RUDOLPH CO.,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

ON PETITION FOR REVIEW OF AN ORDER
OF THE SECRETARY OF AGRICULTURE

Argued March 24, 1966

Before McLAUGHLIN, HASTIE and GANEY, *Circuit Judges.*

OPINION OF THE COURT

(Filed August 24, 1966)

By GANEY, *Circuit Judge.*

This is an appeal under the Judicial Review Act of 1950,[1] seeking a review of an order issued by the Judicial

1. 64 Stat. 1127, as amended, 5 U. S. C. 1031, et seq.

Officer of the Department of Agriculture, pursuant to authority delegated to him by the Secretary of Agriculture. The order was issued pursuant to the Perishable Agricultural Commodities Act, wherein the petitioner was suspended for 90 days from operating in interstate commerce as a commission merchant, dealer and broker in fresh fruits and vegetables. The execution of this order has been stayed by the Judicial Officer pending the outcome of this appeal.

The Perishable Agricultural Commodities Act requires of all persons transacting business in fresh fruits and vegetables in interstate and foreign commerce as commission merchants, brokers or dealers, to be licensed under the Act. 7 U. S. C. 499c. The Act makes it unlawful for persons to engage in "unfair conduct" as defined in 7 U. S. C. 499b. The relevant subsection (4) makes it unlawful—

> For any commission merchant, dealer, or broker . . . to fail or refuse truly and correctly to account and make full payment promptly in respect of any transaction in any such commodity to the person with whom such transaction is had; . . . .

The statute provides for the filing of a complaint with the Secretary of Agriculture of anyone complaining of a violation and whenever the Secretary deems it warranted, a copy of the complaint made will be forwarded by the Secretary to the commission merchant, dealer or broker, who will be called upon to answer. 7 U. S. C. 499f(a). Additionally, 7 U. S. C. 499f(b) provides as follows:

> Any officer or agency of any State or Territory having jurisdiction over commission merchants, dealers, or brokers in such State or Territory and any employee of the United States Department of Agriculture or any interested person may file, in accordance

> with rules and regulations of the Secretary,[2] a complaint of any violation of any provision of this chapter by any commission merchant, dealer, or broker and may request an investigation of such complaint by the Secretary.

If, in the opinion of the Secretary, the facts so warrant, he may have the complaint served on the person concerned and afford him an opportunity for a hearing before a hearing examiner and, in accordance with the provisions of 7 U. S. C. 499b, if the violation is proven, he may suspend the license of the offender for a period not to extend 90 days.

In addition, licensed brokers are required to assign a lot number to each load of the products received and to be sold for the account of another and enter the assigned lot number on the receiving record in connection with the respective loads and on sales tickets identifying sales from such lots and such lot numbers shall be placed on the sales tickets at the time of the sale. Additionally, these records and documents must be kept in file for a period of 2 years.

In early 1961, Hicks Produce, Inc., filed with the Department of Agriculture a complaint concerning 57 shipments of tomatoes consigned to the petitioner for its account. These shipments comprised 98,692 cartons of tomatoes. Upon investigation by the Department, the books of the petitioner were examined for the period through May, 1961, during which the above shipments had been handled by the petitioner. The investigators were unable to secure the accounts receivable records for this period for the reason, as averred in the petition for review, certain business records were unavailable since it was alleged they had disappeared in an accident which had occurred in a

2. 7 U. S. C. 499o gives the Secretary authority to make such rules and regulations as may be necessary to carry out the provisions of the Act. 7 C. F. R. 47.27(b) provides that "Disciplinary proceedings may be instituted only upon moving papers filed by the Deputy Administrator acting either as a result of the informal-complaint proceduce hereinbefore provided *or on his own motion.*" (Italics ours.)

storage place of petitioner's business. However, the investigators compared invoices reflecting the sale of Hicks' tomatoes with prices actually paid by the buyers and a comparison of the prices actually paid revealed a number of discrepancies and, as a result of their examination, the investigators were able to identify sales of 83,313 containers and they reconstructed an account sales which showed net proceeds of $106,221.77 in connection therewith. Comparison of the figures reported by the petitioner to Hicks showed net proceeds of $104,545.57; there thus was an underpayment by the petitioner to Hicks of $1,676.20.

Accordingly, on April 17, 1962, after the investigation of Hicks was completed, representatives of the Department of Agriculture met with the officers of the petitioner and their attorney and went over their findings. While there was a denial of any underpayment or discrepancies by the petitioner, in order to close the matter out the petitioner tendered a check for $1,676.20, payable to Hicks.

On the next day, April 18, 1962, the chief investigator for the Department of Agriculture, Koenigsburg, informed the officers of the petitioner that, in conformity with the Department's procedure, its records would be spot-checked to determine whether the Hicks case was an "isolated case" or whether it was a regular practice. The record discloses that at that time an informal disciplinary complaint was served by Investigator Koenigsburg upon the respondent, but, on motion of the petitioner when listed for argument in this court, any reference to this informal complaint was stricken by the court since the complaint itself was not introduced in evidence and made a part of the record in the case.

The main thrust of the petitioner's contention is that prior to the commencement of this second of the two investigations on April 18, 1962, one day after the completion of the Hicks investigation, which uncovered wrongdoing, there had not been filed by the Secretary of Agriculture "a

complaint by a person aggrieved by an alleged violation of the Act."

However, at that time no objection was raised by the petitioner to the investigators' perusal of the company's books, but, in fact, it advised them that it would cooperate fully and would furnish all books, records and accounts to be available to the investigators who began the investigation the following day. As adverted to above, and at the petitioner's suggestion, it placed at the disposal of the investigators all of the books, records, etc., that were available. It can thus be readily seen that the petitioner had adequate notice of the investigation and was willing that it proceed and by their conduct in placing the books and records that were available at the investigators' disposal, waived any technicality of being served with an informal complaint. Furthermore, it can be seen that this investigation, one day later, stemmed from the Hicks investigation which was begun after a complaint, so there was continuity of the investigation to determine additional wrongdoing, prompted by the discovery of the wrongdoing discovered in the Hicks investigation. There would be manifest unfairness to the Department of Agriculture if this objection, raised long after the administrative process was over, and occasioned by the Government's failure to make the informal complaint part of the record, caused us to hold that the requirement of such an "informal disciplinary complaint" was requisite, and could not be waived by respondent's consent. In the face of the petitioner's agreement to the investigation, the aid and assistance rendered by it, it was tantamount to a waiver of the requirement of the statute, as we shall in more detail point out.

The investigators selected, at random for detailed investigation, 35 shipments received by the petitioner during the period October 4, 1960, through April 12, 1962, and they discovered that the petitioner (1) did not maintain proper receiving records at the store or depot; (2) while sales at the store were not identified by lot numbers in all

cases, in many cases shipper's initials or other identifying marks had been used, which method, while unsatisfactory in a number of cases, was the only available method; (3) while the sales made at the depot were identified by the number of the railroad car in which the produce was received, when a portion of the shipment was transferred to the store for sale, a ticket was issued showing a sale to the store at a price which was normally lower than other sales made at the depot; and (4) the petitioner's accounts receivable records for the period January 1, to July 1, 1961, were missing and they alleged they had been lost or inadvertently destroyed.

Based on the petitioner's records, the investigators compared account sales for these shipments with the account sales petitioner had actually rendered to the shippers and in each of the 35 instances, the comparisons disclosed discrepancies ranging from an underpayment of $840.26 to an overpayment of $159.62, which is substantially supported in the record.

On May 23, 1962, after completion of the investigation, the investigators again met with Messrs. Mandell, Spector and Rudolph, and Ned Stein, their attorney, and advised them of the results of their investigation.

Later, on July 26, 1962, the Department wrote to the petitioner a 78 page letter setting out in a most detailed accounting each one of the 35 cases investigated and noted the underpayments and discrepancies therein. While it is a fact that the sales from the shipments received had to be reconstructed both at the petitioner's store location, as well as those at the depot location (two service centers maintained by the petitioner), by matching sales tickets and shipments name or initials; and, further, that fewer sales of a commodity from a shipment could be found than were actually contained in that shipment, in which instances the investigators were compelled to compute an average price of a commodity from the identifiable sales of a particular shipment, nevertheless, all of this was the best and only

method available by reason of mislaid or lost records and the failure to assign lot numbers to shipments by the petitioner.

Some six months later, on November 27, 1962, the Department again wrote to the petitioner explaining that an examination of the records of the Hicks case revealed that it did not maintain proper receiving records, that it did not assign and use lot numbers and that it was unable to locate and produce the accounts receivable ledgers. It also reminded petitioner of the fact that it had tendered to Hicks a check in the amount of $1,676.20 in restitution of its underpayment; that concerning the additional investigation made as a result of what was uncovered in the Hicks case, 35 additional shipments were investigated covering a period from October, 1960, to April, 1962, which revealed that it had under-reported and under-paid the net proceeds of 28 shipments and had over-reported and overpaid in 7 shipments. It can thus be seen that, here again, the Government reiterated to the petitioner the discrepancies that it had previously found. The letter further advised petitioner that it was to make restitution of the underpayments, but it had declined to so do and that violations such as had been found were of sufficient grounds to institute disciplinary action which could result in the revocation or suspension of its license and, finally, the letter was addressed to it, as stated, in compliance with § 9(b) of the Administrative Procedure Act, 5 U. S. C. 1008(b), and they were now affording petitioner an opportunity to furnish any explanation or comments pertaining to the transactions therein listed and stating that its reply should reach the office of the Department not later than December 19, 1962.

Ned Stein, attorney for the petitioner, replied to this letter on December 17, 1962, and he specifically denied the underpayments, as well as the overpayments, and admitted therein that a request had been made for payment of these underpayments, but his client felt that there was

no liability therefor and that, "Under the circumstances, my client is desirous of defending any disciplinary action which your department may care to institute."

The record discloses that at the hearing before Examiner Curry on March 24, 1964, Eugene N. Carlucci, an investigator, testified with respect to 25 of the underpayments discovered, as follows:

> We advised them [petitioner] of the discrepancies in the last 25 accountings. And Mr. Stein [counsel for the petitioner] stated that he could not dispute our figures, as we had thoroughly examined the records, and the figures were obtained from his client's records. We asked the officers of the firm if they thought differently, and they replied that they did not. Mr. Mandell said that there must be some explanation because they actually did not underpay anyone even though the records indicated they did.
>
> Mr. Stein also said at this time he wanted to discuss this matter with Mr. Gardner and Mr. Dimond before recommending the payment of the underpayments found.
>
> Q. At that time they could not come forward with any explanation as to the discrepancies that you found?
>
> A. No, sir.
>
> Q. At that time did they attempt to indicate to you how they arrived at the manner in which they put together the figures from which they made up their respondent's account sales?
>
> A. No, sir.

On March 20, 1963, the acting director of the Fruit and Vegetable Division filed with the Secretary of Agriculture a formal complaint charging petitioner with (1) having failed to account and make payment for the net proceeds realized from sales concerned; (2) having failed to maintain and preserve such accounts and state fully and correctly all transactions involved in its business; and (3) having repeatedly and flagrantly violated 7 U. S. C. 499b

by its failure to account and make payment truly and correctly. Petitioner's license automatically terminated on October 21, 1963, because of their failure to pay the annual licensing fee which was apparently an oversight on its part, rather than a desire on its part to permit the license to terminate. In December, 1963, the Director of the Fruit and Vegetable Division filed with the Secretary notice to show cause why a license should not be denied to the petitioner, the grounds therein asserted being substantially identical to those previously made in the complaint. The two proceedings were consolidated and a hearing conducted in Philadelphia before a hearing examiner. In December, 1964, the hearing examiner recommended that any license held by the petitioner under the Act be revoked and its application for a new license denied, to which exceptions were duly filed by the petitioner.

Following oral argument, on May 14, 1964, the Judicial Officer entered his order containing extensive findings of fact and conclusions of law with respect to the Hicks transaction and with respect to the erroneous accounting concerning the 35 other lots which the investigators had examined. He also found that, by letter dated November 27, 1962, sent in accordance with § 9(b) of the Administrative Procedure Act, 5 U. S. C. 1008(b), petitioner had been afforded the opportunity to achieve compliance with the Act, but failed to so do. He also found that the averaging of sales was not arbitrary and had basis in fact and logic to support it and could not be characterized as unreasonable and was necessary to arrive at the approximate amount actually owing to the consignors and joint account partners. He considered the violations "the most serious and flagrant type possible under the act" since they involved "breaches of fiduciary duty by an agent to his principal and by a joint account partner to his joint venturer" and, finally, ordered the suspension for ninety days of any license held by the petitioner and that a new license should not be issued until the expiration of that period.

In *American Export and Isbrandtsen v. Federal Maritime Commission*, 334 F. 2d 185, where a letter, in an instance similar to the factual situation here under review, was held not to be a formal complaint, nevertheless the court held that from a review of the record they were satisfied that no substantial right of due process was denied to the petitioner and no prejudice was suffered by it by its failure to comply with Rule 5(b) and 8(c) concerning formal complaints under the Federal Maritime Commission Rules of Practice and Procedure, 46 C. F. R. c.iv § 502.67.

It is submitted that § 9(b) of the Administrative Procedure Act, 5 U. S. C. § 1008(b),[3] was fully complied with here by reason of the fact that the petitioner was notified by letter of the violations and given an opportunity to redress its misconduct, but it failed to so do.

It is submitted the Secretary of Agriculture sustained the burden of proving violations of the Perishable Agricultural Commodities Act for purpose of imposing a punitive license suspension and that his order of license suspension should be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

---

3. This section, in pertinent part, provides: "Except in cases of willfulness or those in which public health, interest or safety requires otherwise, no withdrawal, suspension or revocation, or annulment of any license shall be lawful unless, prior to the institution of agency proceedings therefor, facts or conduct which may warrant such action shall have been called to the attention of the licensee by the agency in writing and the licensee shall have been accorded opportunity to demonstrate or achieve compliance with all the lawful requirements."

BLANK

PAGE